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# Professional dental and oral surgery liability in Italy: a comparative analysis of the insurance products offered to health workers

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**Abstract:** Introduction: In Italy there has been an increase in claims for damages for alleged medical malpractice. A study was therefore conducted that aimed at assessing the content of the coverage of insurance policy contracts offered to oral health professionals by the insurance market.

Material and methods: The sample analysed composed of 11 insurance policy contracts for professional dental liability offered from 2010 to 2015 by leading insurance companies operating in the Italian market.

Results: The insurance products analysed are structured on the "claims made" clause. No policy contract examined covers the damage due to the failure to acquire consent for dental treatment and, in most cases, damage due to unsatisfactory outcomes of treatment of an aesthetic nature and the failure to respect regulatory obligations on privacy.

Discussion: On entering into a professional liability insurance policy contract, the dentist should pay particular attention to the period covered by the guarantee, the risks both covered and excluded, as well as the extent of the limit of liability and any possible fixed/percentage excess.

**Keywords:** Professional liability, Malpractice, Insurance policy, Forensic dentistry

#### 1 Introduction

The advances in diagnostic and therapeutic skills that have taken place in most sectors of medicine, and dentistry in particular, have led to an increasingly greater demand from patients for accuracy, attention and diligence by their trusted healthcare worker, as well as for results that reach or exceed expectations [1].

In dentistry, since there is a predominantly private relationship between the healthcare worker and patient involving specialist treatments with significant costs, the patient or "client" has greater expectations of good functional and aesthetic results. Failure to reach these expectations has resulted in a significant increase in judicial and extrajudicial litigation, in terms of professional liability.

In the last twenty years there has been a profound transformation in the relationship between doctor and patient, with the greatest importance being placed on the decision-making role assumed by the patient who must be provided with adequate and comprehensive information [2].

In this context accusations of malpractice proliferate for clinical and surgical services affected by presumed technical-ethical misconduct.

The phenomenon is taking place on a supranational level, broadly involving the majority of the western world.

In Italy, an updated fact-finding study conducted by the ANIA (National association of Insurance Companies) highlighted the fact that between 1994 and 2013 the

Conclusions: When choosing a professional liability contract, a dentist should examine the risks in relation to the professional activity carried out before signing.

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number of reported professional medical liability claims more than tripled (rising from a little more than 9,500 cases to around 30,500 cases), revealing a fluctuating trend and an overall increase of 218% in the last twenty vears. The cost of compensation similarly increased, amounting to about 47,000.00 euros for the claims documented in 2002 [3] (Table 1).

In reality, the data presented by ANIA underestimates the phenomenon since it does not consider the claims managed by companies not affiliated to this association or those dealt with directly by healthcare companies and private nursing homes due to the existence of a franchise, self-management or those resolved in mediation.

Therefore, an insurance policy for professional liability that guarantees adequate cover with regard to the activity carried out has become increasingly important for the densist.

The accusations of presumed professional liability may be related both to the diagnostic assessment phase where there is lack of or unsuitable therapeutic specialisation, and to the therapeutic phase where the damage is produced directly [4, 5] (Table 2).

The misdiagnosis or delay in the diagnosis of conditions of the stomatognathic system may derive also from the failure to carry out the most highly effective latest generation diagnostic procedures due to the dentist's lack of such professional training [6].

Table 1: Number of claims filed

Specific type of damage is osteonecrosis of the iaw [7-9].

The annual incidence of dental judicial litigation is 1.5-3%, with one procedure undertaken for every 60,000 cases of treatment carried out [10, 11].

The judgment is promoted in the sphere of civil law (>99%) and the percentage of proven professional liability is high (90-95% in a court of law).

In this regard a fact-finding analysis was carried out on a sample of 11 insurance policy contracts for professional liability offered by leading companies operating in the Italian market in the dental field.

The aim of this study was to assess the type of risks that are insured and the guarantees offered to the oral healthcare professional.

# 2 Materials and methods

A sample of 11 policy contracts for professional dental liability that may be consulted on the web was analysed, which were offered between 2010 and 2015 by leading companies operating in the Italian market [12-22].

Out of this sample a polyparametric fact-finding analysis was conducted, aimed at assessing the following policy conditions:

| Year of registration | Institutional liability | D%     | Individual malpractice | D%     | Total medical liability | D%    |
|----------------------|-------------------------|--------|------------------------|--------|-------------------------|-------|
| 1994                 | 6,345                   |        | 3,222                  |        | 9,567                   |       |
| 1995                 | 11,411                  | 79.9%  | 5,892                  | 82.9%  | 17,303                  | 80.9% |
| 1996                 | 13,028                  | 14.2%  | 4,028                  | -31.6% | 17,057                  | -1.4% |
| 1997                 | 18,672                  | 43.3%  | 4,829                  | 19.9%  | 23,501                  | 37.8% |
| 1998                 | 21,678                  | 16.1%  | 6,036                  | 25.0%  | 27,714                  | 17.9% |
| 1999                 | 23,261                  | 7.3%   | 9,073                  | 50.3%  | 32,334                  | 16.7% |
| 2000                 | 23,249                  | 0.0%   | 10,078                 | 11.1%  | 33,327                  | 3.1%  |
| 2001                 | 21,911                  | -5.8%  | 11,238                 | 11.5%  | 33,149                  | -0.5% |
| 2002                 | 19,028                  | -13.2% | 11,443                 | 1.8%   | 30,471                  | -8.1% |
| 2003                 | 16,566                  | -12.9% | 10,874                 | -5.0%  | 27,440                  | -9.9% |
| 2004                 | 16,356                  | -1.3%  | 11,988                 | 10.2%  | 28,344                  | 3.3%  |
| 2005                 | 16,343                  | -0.1%  | 12,290                 | 2.5%   | 28,633                  | 1.0%  |
| 2006                 | 16,424                  | 0.5%   | 11,959                 | -2.7%  | 28,383                  | -0.9% |
| 2007                 | 16,128                  | -1.8%  | 13,415                 | 12.2%  | 29,543                  | 4.1%  |
| 2008                 | 17,746                  | 10.0%  | 11,851                 | -11.7% | 29,597                  | 0.2%  |
| 2009                 | 21,476                  | 21.0%  | 12,559                 | 6.0%   | 34,035                  | 15.0% |
| 2010                 | 21,353                  | -0.6%  | 12,329                 | -1.8%  | 33,682                  | -1.0% |
| 2011                 | 19,627                  | -8.1%  | 11,782                 | -4.4%  | 31,409                  | -6.7% |
| 2012                 | 19,436                  | -1.0%  | 11,759                 | -0.2%  | 31,195                  | -0.7% |
| 2013                 | 18,376                  | -5.5%  | 12,036                 | 2.4%   | 30,412                  | -2.5% |

Table 2: Malpractice and care pathway

| Errors in the diagnostic phase  | Errors in the therapeutic phase   |  |  |
|---|---|--|--|
| The failure to diagnose syndromes that, left untreated, evolve to compound the damage   | The choice of unsuitable treatment  |  |  |
| The failure to diagnose syndromes that, left untreated or unconsidered, jeopardise the therapeutic success of the dental surgery or exacerbate a pre-existing pathology | Errors in anaesthesia (local-regional anaesthesia)  |  |  |
|   | Incorrect execution of surgery  |  |  |
|   | Incorrect execution of restorative dentistry-endodontic, implant, periodontal, prosthetic or orthognatodontic practices |  |  |
|   | Failure to follow-up  |  |  |

#### 2.1 Duration of the contract

Term during which the policy is valid.

## 2.2 Territorial scope of the policy

Territorial extension (States) for which the insurance cover is valid.

# 2.3 Limit of liability

The maximum amount that the insurance company shall be required to pay to the injured parties by way of capital, interest and expenses per each claim (limit of liability per claim) and per overall sum of all the claims pertaining to the same period of insurance (limit of liability per year).

## 2.4 Percentage excess /fixed excess

Percentage of the compensation for damages charged to the policy holder established at the moment of the signature of the policy (percentage excess) / predetermined economic value charged to the policy holder independently of the extent of the compensation (fixed excess).

# 2.5 Time available and method of informing the insurance company of the claim

Chronological limit (generally expressed in days) within which the policy holder must communicate to the insurance company that he/she is aware of a claim.

#### 2.6 Timeframe of operation of the guarantee

There are two different types of clauses that take into consideration two distinct moments during the formulation of the claim:

The first is the "claims made" clause which, introducing a conventional definition of claim, confers relevance on the date of request for compensation by the third party for damage attributable to the negligent conduct of the professional that occurred during the period of validity of the policy itself and reported within the same time limit;

The second clause deals with the "loss occurrence", which confines the operation of the guarantee to the acts of negligence which occurred during the period of validity of the policy, regardless of the date of request for compensation and reporting of the claim.

#### 2.7 Retroactive effect or previous guarantee

Period of extension of the efficacy of the insurance with regard to negligent conduct carried out before the signing of the policy contract with the "claims made" clause, but whose request for damages had not arrived at the moment of the signing of the insurance contract.

# 2.8 Extended validity or post-contractual guarantee

Period of extension of the efficacy of the insurance in reference to requests for damages which arrived subsequent to the end of the insurance contract subject to the "claims made" clause and relating to negligent conduct carried out during the period of validity of the policy.

#### 2.9 Suspended insurance days

Period subsequent to the date of expiry of the policy during which the insurance cover is nevertheless active, awaiting the possible renewal of the same contract.

# 2.10 Cover for the insured professional's collaborators

Cover for damage caused due to incorrect conduct, in the performance of the activities covered in the policy, of persons for whose work the policy holder is legally required to cover, including employees and collaborators.

#### 2.11 Cover for dental implantology

Cover for damage due to the incorrect application of dental implants used to functionally rehabilitate a patient affected by partial or total edentulism.

#### 2.12 Cover for cosmetic medicine practices

Cover for damage due to technical, medical or surgical errors, aimed at the recovery, maintenance or improvement of the patient's aesthetic appearance.

# 2.13 Cover for damage deriving from the use of x-rays

Cover for damage due to the possession and use of sources of ionising radiation for diagnostic purposes.

# 2.14 Cover for damage deriving from the violation of the regulations on the protection of privacy and the incorrect processing of personal data

Restoration of asset losses and cover for damage caused to third parties as a consequence of the incorrect management of personal, generic and sensitive data.

# 2.15 Cover for damage deriving from inadequate information and consent

Cover for damage due to incorrect information pertaining to the diagnostic-therapeutic course of treatment.

#### 2.16 Legal protection

Cover of costs for legal aid, in both judicial and extra-judicial fora, within a pre-established limit of liability.

# 2.17 Repayment of the fees paid for inappropriate dental services

Provision for the restitution of the fee paid for treatment deemed inappropriate.

# 3 Results

The fact-finding study carried out has verified that the time frame of operation of the guarantee offered by all the insurance products are inspired by the "claims made" clause, which is namely intended to cover the claims for compensation formulated for the first time during the period of validity of the insurance contract and relating to damage produced in the same period.

There is a predetermined maximum retroactive effect of 2 years in 18.2% of the sample and unlimited retroactivity in a similar percentage.

In more than half of the sample (54.6%) the extension of the retroactive effect is to be agreed, with the possibility of an unlimited extension (in 4 cases) and, in reference to a predefined period, a maximum duration of 5 years (in 2 cases).

Extended validity ranges from a minimum of 15 days (2 cases) to a maximum of 3 years (1 case) in reference to pre-established time limits, there being in 18.3% of the sample the possibility of an agreement, with the potential in individual cases of a 5 year, 10 year and unlimited extension.

In the case of death the extended validity is extended to 5 years in 18.3% of the sample and to 180 days in 9.1% of the same sample.

In reference to the limit of liability, this may be agreed as per the insured year, per each individual claim or, even, per year and per claim.

In about 3/4 of cases (72.7% of the sample examined) this is to be agreed and refers to the individual claim and insured year.

In 27.3% of cases the choice of the maximum coverage may fall within a range of pre-established values, with extremes of between 1 million and 5 million euros.

In one case the limit of liability is not specified.

27.3% of cases provided both the percentage excess and the fixed excess: in 2 cases the percentage excess is equal to 10% and in one to 15%; the concomitant fixed excess fluctuates between a minimum of 500.00 euros and a maximum of 40,000.00 euros.

In a further 27.3% of the sample there is a sole fixed excess, which fluctuates from a minimum of 500.00 euros (2 cases) and a maximum of 5,000.00 euros (2 cases).

In one case there is neither a fixed excess nor a percentage excess and in 4 cases the same parameters are to be agreed.

In reference to the territorial extension none of the policies provide for insurance cover for negligent conduct which occurred in Canada and in the USA; in 18.2% of the sample the territorial extension is limited solely to the Italian territory (therefore excluding the Vatican State and the Republic of San Marino); in 27.3% the insurance cover is extended, apart from in the territory of Italy, the Vatican State, the Republic of San Marino, and in a further 54.6% of the States of the European Union.

It is possible to sign contracts with insurance cover with a duration of one or more years.

In the absence of the expressed notice of cancellation, the insurance contract may be automatically extended once or several times, subject to a written communication to be presented within a term indicated in the contract.

In more than half of the sample (54.6%) the duration of the contract is pre-established at 12 months, being subject to a prior agreement in the remaining part of the sample (45.4%).

There is automatic renewal in 36.4% of cases.

With regard to the risks insured, no policy contract examined covers the damage due to the failure to acquire consent to the dental service; in 72.8% of the sample the cover of damage due to incorrect implant work are guaranteed, although in 54.6% of cases such a guarantee is to be agreed in advance.

Almost all of the policies (10/11) insure against damage due to x-rays used for diagnostic purposes, although in one case such a guarantee is subject to a prior agreement.

In 63.7% of the sample unsatisfactory outcomes of aesthetic treatments are not covered; in one case such coverage is admitted although it is limited to implant work and in 27.3% of the sample a prior agreement is required,

with a topographical limitation (lower third of the face) in one case and in another case the provision of a limit of liability for loss equal to 50,000.00 euros.

The work of the employees of the policy holder is covered in 63.7% of the sample, subject to prior agreement in 27.3% of cases

The failure to respect regulatory obligations on privacy is not subject to insurance cover in 63.7% of the sample; where provided for, reference is made to a maximum payment threshold per claim and/or per insurance year.

On average the time available to communicate the claim is identified as 15 days.

Generally the report by the policy holder to the company must be presented in writing, must contain the name and address of the injured party, the date, an account of the facts, the indication of the causes and consequences of the claim and any other information that may be useful to the company.

It is also requested that the company should receive all of the available health and legal documentation, as well as a confidential report on the events.

The policy holder is forbidden to admit liability, define or pay for damages, conduct transactions or settlements without the preliminary written consent of the company.

Legal protection is guaranteed in 81.9% of the sample, subject to prior agreement in 9.1% of cases.

# 4 Discussion

The number of legal proceedings involving the assessment of professional liability in the dental sector is increasing steadily, representing about 7-8% of all health-related litigation [23].

In particular, therapeutic errors in the dental field may involve different sectors and specialisations: endodontics, orthodontics, periodontics, ortognatodontics, implantology, dental prosthetics, and oral surgery and may consist of iatrogenic damage, damage caused by the improper use of dental instruments or damage resulting from the incorrect sanitisation and sterilisation of the dental instruments.

Therapeutic activities that are particularly costly and of significant aesthetic value, such as prosthetics and implantology are the ones that predominantly give rise to litigation [24].

It must be emphasised that dental treatments are carried out as elective services, for which there are less justifications and excuses for errors, and that damage is predominantly the result of the violation of a prohibition, in which it is easier to demonstrate, a posteriori, the technical error at the litigation stage, and also due to the fact that dental treatment is carried out on hard tissues which renders the damage produced more easily identifiable.

The dentist has an obligation to the patient to use the most suitable materials to achieve the required aims, and is liable for the quality of materials chosen, for the aesthetic element of the treatment carried out, for optimistic unfulfilled promises or even for not providing the patient with enough information.

With regard to the commodity-related and morphological aspects of dental products, it is necessary to stress that the patient must be assured that the use of medical devices is in compliance with European Community directives, such as the guarantee of sterility and the prerequisite of technical reliability, as imitation products are common in the sphere of health care (no doubt of low cost, but in any case of dubious quality, with a lower functional performance and negative effect also on the aesthetic aspects of the treatment).

More frequently the method for beginning the litigation is represented by the claim for compensation for damages addressed directly to the dentist or even, although more rarely, through a writ of summons in opposition of an injunction order instituted by the dentist to recover the honorary.

In this context the opportunity at least for the professional to sign insurance guarantees that his/her activities are covered [25].

Before signing an insurance policy contract to cover professional risk it is advantageous for the dentist to pay close attention to the guarantees covered by the said policy, thus avoiding the risk of a direct financial outlay for the damage caused despite the payment of the annual insurance premium.

The claims-made policies limit the effectiveness of the cover to the date of the claim where compensation must fall inside the period of validity of the policy. Such a clause presents enormous disadvantages where it is not associated with supplementary forms of guarantees such as the "retroactive effect" (meaning an operating guarantee with reference to the negligent conduct that occurred before the signing of the policy, but whose claim for compensation has not yet been received at the moment of the signing of the insurance contract) and the "tail coverage" or "extended validity" (meaning an operating guarantee with reference to the conduct that occurrd during the period of validity of the policy but whose claim for compensation was received by the policy holder only after the termination of the insurance contract).

In effect, many claims may not be covered by insurance in existing policies with a retroactive effect that is temporally limited and in existing policies that do not provide for extended validity.

The policies dealing with "loss occurrence" that protect the policy holder from the claims for compensation received even after the termination of the contract but related to negligent behaviour during the period of validity of the contract, do not lend themselves to protecting the professional where there is an explicit exclusion from the same guarantee with regard to the claims for compensation made many years after the occurrence, just as they are not subject to covering the instances of negligent conduct occurring before the signing of the policy contract.

Most policies currently available on the Italian insurance market are claims-made policies; some of them are without the provision of a period of retroactive effect, while others have a retroactive effect for a limited time and very few have an unlimited retroactive effect. The policies, then, do not generally consider the provision of a supplementary guarantee of extended or post-contractual validity.

The policies capable of providing sufficiently extended protection are those which provide for a broad retroactive or even unlimited effect and a likewise broad or unlimited post-contractual guarantee (or extended validity).

If the possibility for such insurance guarantees is available, the possibility for the dentist to remain indemnified from the claim for compensation for damage shall be greater with a longer period of retroactive effect and with longer extended validity.

It is of no less importance to assess also the limit of liability (per claim and per year) guaranteed by the policy contract, although it must be considered that the amounts put in place to cover the professional in relation to the fact-finding study conducted, broadly cover the average costs of the compensation from the incorrect conduct of the dentist. It must be emphasised that within the limit of liability, in general terms, the fees charged by the dentist, such as the fee for the work carried out that is judged to be improper, are not included.

It is important to assess also the possible provision and extent of the fixed excess/percentage excess.

The fixed excess has the purpose of allowing the insurance company to avoid making the pre-established payments, while the percentage excess has the function of charging the policy holder a pre-established percentage of the compensation value of the damages, no matter how much it is.

The substantial difference between the two clauses is, in practical terms, the possibility of knowing the amount of the fixed excess upon signing the insurance contract and before the compensation, against the inability to determine of the value of the percentage excess.

It is equally appropriate to assess the type of dental work (diagnostic, surgical, implantological, for aesthetic purposes) whose possible negative outcomes are covered by the insurance company, as well as to verify the existence of cover for any possible damage caused by the person's own collaborators/consultants in the case where the dentist managing the study is assisted by other professional figures.

In this regard an insurance contract must be signed with cover for specific risks of an organisational nature where the dentist holds the title of Health Director of the study.

It would likewise be useful to provide insurance cover for damages for the acquisition of invalid informed consent, the latter representing one of the most frequent grounds for complaints from patients and for the legal censure of the professional.

## **5 Conclusions**

The signing of a professional liability policy in Italy represents an ethical and legal obligation for the dentist, and the knowledge of the most important parameters that characterise insurance contracts is particularly relevant in order for the professional to be fully protected and covered for any compensation claims to be paid out personally.

An appropriate period of retroactive effect and of extended validity for a low cost or at least balanced insurance premium, together with prudent choices with regard to the insured risks related to the professional activity, represent the most important parameters and should be taken into consideration by the dentist at the moment of signing a professional liability policy contract.

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